UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

TANYA L. MARCHWINSKI,
TERRI J. KONIECZNY, and
WESTSIDE MOTHERS, on behalf
of all similarly situated persons,

Plaintiffs,

Case No. 99-10393

v

Hon. Victoria A. Roberts

DOUGLAS E. HOWARD, in his
official capacity as Director of
THE FAMILY INDEPENDENCE AGENCY
of Michigan, a Governmental Department
of the State of Michigan,

Defendant.
_____/

DEFENDANT'S BRIEF IN OPPOSITION
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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STATEMENT OF ISSUES PRESENTED

I.

Whether the State's requirement that recipients of FIP assistance submit to suspicionless drug testing is reasonable under the Fourth Amendment in light of the State's important interests in ensuring self-sufficiency of FIP clients under the welfare-to-work requirements of federal law and in ensuring the well-being of dependent minors, the diminished privacy expectations of those who voluntarily seek public assistance, and the only minimally intrusive procedures used for testing.

II.

Whether a preliminary injunction would substantially impair the State's ability to meet the work-participation goals required by federal law within the limited time period prescribed thereby and would otherwise harm the public interest.

III.

Whether the Plaintiffs have adequately demonstrated that they will be irreparably harmed by a continuation of the State's drug-testing pilot program while this case is pending.

STATEMENT OF CONTROLLING AUTHORITY

I.

Chandler v Miller, 520 U.S. 305 (1997)

*Knox County Education Ass'n v Knox County Board of Education,*158 F.3d 361 (1998)

*Skinner v Railway Labor Executives' Ass'n,*489 U.S. 602 (1989)

*Treasury Employees v Von Raab,*489 U.S. 656 (1989)

Vernonia School Dist 47J v Acton, 515 U.S. 646 (1995)

Willner v Thornburgh, 928 F.2d 1185 (D.C. Cir. 1991), *cert denied,* 502 U.S. 1020 (1991)

*Wyman v James,*400 U.S. 309 (1971)

II.

American Hospital Ass'n v Harris, 625 F.2d 1328 (7th. Cir. 1980)

Bowen v Kendrick, 483 U.S. 1304 (1987)

Gaudiness v Lane, 733 F.3d 1250 (7th Cir. 1984)

Hamlin Testing Labs, Inc. v U.S. Atomic Energy Comm'n, 337 F.2d 221 (6th Cir. 1964)

Walters v Nat'l Association of Radiation Survivors, 468 U.S. 1323 (1984)

DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The sole question presented in this case is whether the State of Michigan's requirement that recipients of assistance under the State's Family Independence Program ("FIP") submit to suspicionless drug testing constitutes an unreasonable search and seizure under the Fourth Amendment. The Supreme Court has long held that the reasonableness of a particular search is determined by balancing the intrusion on the individual's expectation of privacy under the particular circumstances against the promotion of legitimate government interests furthered by the search. As demonstrated below, the State's interest in ensuring permanent self-sufficiency of FIP clients under the welfare-to-work requirements of federal law together with its long-standing interest in ensuring the well-being of dependents of adult recipients -- both interests which are jeopardized by substance abuse -- far outweigh the diminished privacy expectations of those who voluntarily seek public assistance.

STATEMENT OF FACTS

A. The Federal Welfare-to-Work System Under PRWORA

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. 104-193, instituted a fundamental change in the provision of public assistance for low income families with minor children. In particular, PRWORA ended the open-ended entitlement national welfare program known as Aid to Families with Dependent Children ("AFDC") and replaced it with the block-grant Temporary Assistance for Needy Families ("TANF") program. *Id.*, Tit. I, 110 Stat. 2113; 42 U.S.C. § 601. In contrast to AFDC, TANF's primary goal is to promote self-sufficiency by moving welfare recipients into jobs and ensuring that welfare is a short-term, transitional experience rather than a way of life. *See, e.g., id.*; 64 Fed. Reg. 17720, 17721 (describing PRWORA goals).

To this end, PRWORA imposes certain work requirements on adult recipients of TANF assistance and limits the amount of time a person may receive such assistance. For example, TANF requires that adult recipients of cash assistance must find employment within two years of the beginning

of their assistance, 42 U.S.C. § 602(b)(1)(a), and it places a five-year lifetime cumulative limit on an individual's eligibility for assistance. 42 U.S.C. § 608(a)(7).[1]

PRWORA also contains various provisions concerning substance use and abuse. Of particular relevance here, PRWORA authorizes states to test TANF recipients for illegal drug use. PRWORA, Tit. IX, § 902, 110 Stat. 2347; 21 U.S.C. § 862b.

B. The State's Duties and Obligations in Fulfilling the Welfare-to-Work Requirements.

Michigan's TANF program is part of its Family Independence Program ("FIP") and is administered by the State's Family Independence Agency ("FIA"). Under TANF, the State is provided a certain amount of funds to run welfare programs of its own design, within broad federal guidelines. *See*, ACF, *Summary of Final Rule, Temporary Assistance for Needy Families (TANF)* at 1 (Exh. 1),[2] 64 Fed. Reg. 17720, 17722. In exchange for this flexibility, the State is held accountable for moving families from welfare to self-sufficiency through work. Exh. 1 at 3, 64 Fed. Reg. 17720, 17722. For instance, the State is required to meet two separate work participation rates that reflect how well it has succeeded in engaging adults in work activities. *Id.* The minimum participation rate for adults was 25% in 1997, 40% in 2000, and rises to 50% in 2002. *Id*. For two-parent families, the current minimum participation rate is 90%. *Id*. Failure to meet these participation rates subjects the State to monetary penalties. *Id*.; *see also* 42 U.S.C. § 609(a)(3).[3]

[1]Exemptions from the lifetime limit requirements are limited to a maximum of 20% of a state's caseload. 42 U.S.C. § 608(a)(7)(C)(ii). Although the states have the discretion to determine the criteria for those clients falling within this 20%, it is expected that there will be strong competition for these slots given the multitude of problems---some of them incurable---that may compromise one's ability to work. In addition, there is no certainty that substance abuse even qualifies for an exemption. Certainly, no statute or regulation mandates that drug addiction is considered an exemptible disability. In Michigan, it is expected that most, if not all, of the 20% of the FIP caseload will be consumed by ineligible grantees, *i.e.*, grandparents, whose needs are not in the FIP grant, who are raising their grandchildren. *See* Exh. A, Affidavit of Ann Marie Sims, ¶16; n.13, *infra*.

[2]The final rules described in Exhibit 1 are implemented in 45 C.F.R. Parts 260 through 265.

[3]There are numerous other penalty provisions, including for failure to comply with the five-year lifetime limit on federal funding of assistance. 42 U.S.C. § 609; Exh. 1 at 11-12. States may reduce or avoid these penalties only in certain narrowly prescribed circumstances. *Id*. at 11 (noting narrow exceptions meant "[t]o ensure state accountability").

C. Substance Abuse as a Barrier to Employment

The implementation of TANF poses particular problems with respect to clients known as the "hard to place." These individuals suffer from various barriers to employment which prevent them from obtaining and, more importantly, maintaining employment. Under TANF rules, these barriers to employment have been raised to a new level of significance. In light of the federal five-year lifetime limit on receipt of TANF cash assistance and the two-year limit on finding employment, the onus is now on the states to find ways to help the hard to place become and stay employed.[4]

One widely recognized barrier to employment is substance abuse.[5] While studies differ as to the exact prevalence of drug use and abuse among welfare recipients, there is ample agreement that a substantial percentage of welfare recipients use drugs, that a certain percentage of those users are impaired by drug use, and that the percentages of use and impairment are higher among recipients than non-recipients.[6] *See* Table A, attached hereto (summarizing findings of a number of studies and

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[4]*See, e.g.*, A. Johnson & A. Medelstroth, Report to HHS, *Ancillary Services to Support Welfare to Work* at 3 (Mathematica Policy Research, 1988) (excerpt at Exh. 2) (TANF program heightens importance of designing services that will enhance employment outcomes for 54% to 89% of the welfare population with at least one barrier to employment); L. Pavetti et al., *Welfare-to-Work Options for Families Facing Personal and Family Challenges: Rationale and Program Strategies* at 2-4 (Urban Institute/American Institute for Research, 1997) (Exh. 3) (welfare reform necessitates that states find a way to help the estimated 54% of the TANF caseload with barriers find and maintain employment).

[5]*See, e.g.*, L. Pavetti et al., Exh. 3, at 21; K. Olson & L. Pavetti, *Personal & Family Challenges to the Successful Transition from Welfare to Work* at 5 (Urban Institute, 1996) (Exh. 4); American Psychological Ass'n ("APA"), *Making Welfare-to-Work Really Work* (1998) at 2-3 (Exh. 5); R. Robles et al., "Social and Behavioral Consequences of Chemical Dependence," in *Drug Addiction Research and the Health of Women* (NIDA, 1988) (Exh. 6); R. Jayakody et al., *Welfare Reform, Substance Abuse and Mental Health* at 9-10 (Sept. 1999) (Exh. 7); Johnson & Medelstroth, Exh. 2, at 6; Diana D. Woolis, "Family Works: Substance Abuse Treatment and Welfare Reform," *Public Welfare* (Winter 1988) (Exh. 8); I. Bush & M. Kraft, "The Voices of Welfare Reform," *Public Welfare* (Winter 1988) (Exh. 9); R. Renwick & M. Krywonis, "Personal & Environmental Factors Related to Unemployment," *Journal of Rehabilitation* (Vol. 58, Jan. 1992) (Exh 10).

[6]Recognizing the changing face of welfare launched by TANF, which has resulted in the number of active FIP cases between March 1994 and May 1999 decreasing by 68.5% in Michigan, a report co-authored by Sheldon Danzinger, one of the authors of a University of Michigan study that Plaintiffs attach to their brief as Exhibit R, found that those remaining on the TANF caseload in the fall of 1998 were twice as likely to be drug dependent as those who were no longer on assistance. *See* Jayakody et al., Exh 7, at 21. *See also* Sims Aff., ¶¶5, 9.

reports, all of which are attached as Exhibits). Moreover, it is widely recognized that the prevalence estimates in many of these studies are understated because of the inaccuracies of self-reporting.[7]

The research that has been conducted to date also demonstrates that the effect of substance abuse on the poor is particularly devastating, in part because of its detrimental effect on maintaining employment.[8] Given the documented prevalence of drug use among the welfare population and its potential impact on the success of efforts to transform the welfare system into one that is temporary and work-oriented, substance abuse identification and treatment is a critical component of any successful welfare-to-work program.[9]

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[7]For example, the results of one state study that conducted in-person interviews of TANF recipients followed by hair analyses showed that while only 12% of those interviewed reported drug use, the hair analysis revealed that in fact 27% had used cocaine, heroine, or methamphetamines in the last three months and that 11% were heavy users of those drugs. *See, e.g.*, HHS, *Patterns of Substance Abuse*, Exh. 11; GAO/HEHS-98-29, *Drug Abuse Treatment Data Limitations Affect the Accuracy of National and State Estimates of Need* at 5 (1998) (noting that it is well-known that self-reporting likely results in underreporting) (Exh. 23); CESAR Fax, "Are Welfare Recipients More Likely to Use Alcohol and Other Drugs?" (V:48, Dec. 1996) (Exh. 24); Drug Strategies, *Keeping Score 1988*, at 14 (excerpt at Exh. 25); Jayakody et al., Exh. 7, at 12; Cisco & Pearson, Exh. 22, at 2.

[8]*See, e.g.*, Jayakody et al., Exh. 7, at 12-13 ("Prolonged welfare dependence and poverty aggravate existing substance use and mental health problems, and thereby become a barrier to self-sufficiency even among individuals who display few prior risk factors for these diagnoses. At the same time, individuals who enter welfare with existing substance abuse and mental health problems are likely to have prolonged spells."); Robert L. DuPont, M.D., "Should Welfare Mothers Be Tested for Drugs," *Winning the Drug War: New Challenges for the 1990s* at 83 (Jeffrey A. Eisenbach, ed., 1990) (Exh. 26) (article by dependence expert noting that people who must work and have active families do not take as long to hit bottom as the poor, who may lack these support systems); *Olson & Pavetti*, Exh. 4, at 9 ("Unemployment and vocational instability do appear to be more prevalent among persons who abuse drugs or alcohol than among those who do not.").

[9]*See, e.g.*, HHS, *Patterns of Substance Abuse*, Exh. 11 ("[I]ntervention with substance abuse takes on an importance it has not held previously . . . . In the absence of intervention, at the end of two years beneficiaries with substance abuse problems could be ineligible for the program without the ability to be self-supporting."); G. Rubinstein & P. Samuels, "To Reform Welfare, Treat Drug Abuse," *Christian Science Monitor* (December 31, 1997) (Exh. 27) ("[W]ithout more substance abuse treatment and prevention services, hundreds of thousands of welfare recipients won't be ready to work when they reach the federally mandated time limits."); APA, Exh. 5, at 3 ("Women on welfare with drug or alcohol problems . . . will not be able to rise the challenge of becoming self-sufficient without first receiving appropriate treatment for their addiction."); CASA, *Building Bridges*, Exh. 12, at 1 (finding that substance abuse and welfare dependency are "elaborately interconnected," and that escape from the cycle "requires persistence, support, courage and help"); Legal Action Center, Exh. 21, at v-vii; Kirby et al., Exh 21, at 1.

D. Correlation between Substance Abuse and Child Abuse and Neglect.

The social research also shows that substance abuse can have a profound debilitating affect on the family and one's ability to parent effectively.[10] One particularly alarming statistic is the well-recognized link between substance abuse and child abuse and neglect. For example, a 1999 report by the Center on Addiction and Substance Abuse ("CASA") concluded that substance abuse is a factor in 7 out of the 10 cases of child abuse or neglect and that children of parents who abuse drugs are three times likelier to be abused and four times likelier to be neglected. CASA, *No Safe Haven: Children of Substance Abusing Parent*, at i-iii (1999) (Exh. 32). Numerous other studies and reports confirm these results.[11]

[10] *See* J. Brady et al., Report to HHS: *Risk and Reality: The Implication of Prenatal Exposure to Alcohol and Other Drugs* at 14-17 (Education Development Ctr., 1994) (Exh. 28) (in addition to harming fetal development, substance abuse results in behaviors that conflict with parental ability to provide secure and nurturing caregiving); Barry Zuckerman, "Effects on Parents and Children," in *When Drug Addicts Have Children* at 49, 52 (Child Welfare League/American Enterprise Inst., 1994) (heavy drug use not only causes prenatal problems but also interferes with a mother's ability to provide the consistent nurturing and caregiving that promote child development) (Exh. 29); APA, Exh. 5, at 3 ("[M]any children of welfare recipients who have alcohol or drug problems will not be able to avoid the cycle of welfare dependency without prevention services as soon as possible."); *see also* J. Knitzer & N. Cauthen, Report to HHS, *Enhancing the Well-Being of Young Children and Families in the Context of Welfare Reform: Lessons from Early Childhood, TANF, and Family Support Programs* at 25 (Natl. Ctr. For Children in Poverty & Mathematica Policy Research, 1999) (Exh. 30) (noting that helping families with problem such as drug abuse will alleviate risks for poor outcomes with the children); N. Young et al., *Responding to Alcohol and Drug Problems in Child Welfare: Weaving Together Practice and Policy* at 6 (Office of Juvenile Justice and Delinquency Prevention/Child Welfare League, 1998) (Exh. 31) (studies show that substance abuse can "seriously compromise" a parent's capacity to protect a child).

[11] *See, e.g.*, HHS, *Blending Perspectives and Building Common Ground: A Report to Congress on Substance Abuse and Child Protection* (1999) (excerpt at Exh. 33); GAO/HEHS-94-89, *Foster Care: Parental Drug Abuse Has Alarming Impact on Young Children* (1994) (Exh. 34) (78% of foster children reviewed had at least one parent abusing drugs or alcohol); GAO/HEHS-98-40, *Parental Substance Abuse: Implications for Children, the Child Welfare System, and Foster Care Outcomes* (1997) (studies show number of child protection cases involving substance abuse range from 20 to 90%) (Exh. 35); N. Young et al., Exh. 31, at 1-5 (summarizing findings demonstrating strong link between substance abuse and child welfare services); Substance Abuse Hearings, Exh. 16, Statement of Richard P. Barth, at 45 (summarizing findings of study in five major cities showing that in those child welfare cases in which a parent had a substance abuse problem, the parent was more likely to have been receiving welfare).

E. The Positive Impact of Treatment

Studies also show that treatment is successful in getting people back into the workforce and in preventing child abuse and neglect. A study by the National Association of State Alcohol and Drug Abuse Directors, for example, found that treatment of substance abuse substantially increased the employability of low-income clients, with employment rates doubling after treatment in many states. *See* NCADI Press Release, Exh. 19. A similar study of a California treatment program showed that among women with children who received welfare (64% of the women in treatment), the number of abusers dropped by 39% for cocaine, 42% for cocaine powder, and 48% for amphetamines. *See* D. Gerstein et al., *Report to HHS: Alcohol and Other Drug Treatment for Parents and Welfare Recipients: Outcomes, Costs and Benefits* (Natl. Opinion Research Ctr./The Lewis Group: 1997) (Exh. 36). Other studies and reports are in accord.[12]

[12] *See* G. Rubinstein & P. Samuels, Exh. 27 (benefits of treatment have been shown to outweigh costs, and studies in various states show increased employability after treatment); Johnson & Medelstroth, Exh. 2, at 10 (summarizing research data showing positive correlation between treatment and employability of welfare recipients and between treatment and abuse and neglect cases); L. Pavetti et al., Exh. 3, at 22 (summarizing research showing positive correlation with employment); Substance Abuse Hearings, Exh. 16, Statement of Gale Slater, Deputy Executive Director of Second Genesis Inc., at 59 (noting evidence that treatment works); Substance Abuse Hearings, Exh. 16, Statement of William D. McColl, Director Government Relations, Natl. Ass'n of Alcoholism and Drug Abuse Counselors, at 97 (treatment has been shown to cost-effectively move clients from the ranks of unemployment to work, with one national study reduced); N. Young, Exh. 17, at 6 (evidence from a multitude of states shows substantial improvement in employment status after treatment for abuse of alcohol and drugs as well as reduction in welfare caseload); Michael Finigan, *Societal Outcomes and Cost Savings of Drug and Alcohol Treatment in the State of Oregon* (Feb. 1996) (Exh. 37) (documenting substantial benefits of treatment in Oregon).

F. Michigan's Drug Testing Program

Pursuant to section 902 of PRWORA, Michigan enacted a law requiring FIA to institute drug testing of recipients of FIP assistance in four pilot sites. *See* MCL 400.57*1***;** MSA 16.457*l*. The drug testing program instituted by FIA in response thereto is memorialized in FIA's Program Eligibility Manual ("PEM"), Item 280, attached to Plaintiffs' Brief as Exhibit U. PEM**,** Item 280, page 1, expressly states that the drug-testing program is a means to fulfill the FIP mission of "assist[ing] families in becoming self-sufficient" by removing substance abuse as a barrier to employment and by strengthening family relationships.

The specifics of the program are spelled out in detail in the PEM and thus are only briefly summarized here. As a condition of eligibility, all non-exempt applicants for FIP assistance in the pilot sites must be drug tested upon application. *Id*. In addition, 20% of adults and minor parent grantees with active**,** uninterrupted FIP cases due for annual review will be randomly selected at their yearly redeterminations by an independent drug-testing contractor and required to drug test. *Id*. at 2. Drug testing is mandatory for the applicant as well as the applicant's spouse and any adult children.[13] *Id*. at 1.

The test involves collection of a urine specimen in an unobserved setting at an authorized collection site. *Id*. at 2. A lab then screens the specimen only for certain illegal drugs: marijuana, cocaine, amphetamines, opiates (morphine, codeine or heroin), and phencyclidine (PCP).[14] *Id*. at 3. If the initial test is positive, a second confirming test is performed on another sample from the original specimen. A test is considered positive only if the confirming test is also positive and a Medical Review

[13]Ineligible grantees (approximately 25% of the total FIP caseload), *i.e.*, adults whose needs are not included in the FIP grant, are not required to test. For example, otherwise ineligible grandparents who apply for cash assistance for grandchildren in their home would not be asked to drug test. Likewise, parents or guardians receiving SSI would not be required to submit to a drug test as their needs are also not included in the FIP grant. Unless their needs are included in the grant, domestic partners, and any other adults living in the home, are also not required to test. *See* Sims Aff., ¶13**.**

[14]Although the test does not screen for alcohol, a high percentage of illegal drug abusers will have a co-dependency for abuse of alcohol. Through an assessment of a client's positive drug result, the individual's abuse of alcohol will be assessed. Any treatment will deal with the use of both the illegal substance and any alcohol abuse. *See* Deposition of Ann Marie Sims, Plaintiffs' Exh. Y, at 62-3; Sims Aff., ¶8.

Officer ("MRO") certifies the result after contacting the client.[15] *Id*. The MRO forwards the results to the local Drug Testing Coordinator ("DTC"), who records the results and forwards them to FIA. If the result is positive, it is forwarded to the assessment agency. *Id*. at 5. *See also* Exh. C, Affidavit of Patricia Degnan, ¶3.

FIA refers those clients with confirmed positive results to the Department of Community Health ("DCH") for a substance abuse assessment. As part of the assessment, trained independent contractors determine whether the client is "impaired" and needs treatment. *See* Deposition of Ann Marie Sims, Plaintiffs' Exh. Y, at 47-48. If the assessment calls for treatment, the client must undergo the recommended treatment within the prescribed time frame. PEM, Item 280, at 4. Most substance abuse professionals will, at a minimum, recommend a drug abuse awareness education for those individuals who acknowledge illicit drug use and have tested positive for drugs, indicating recent use of an illegal substance. *See* Exh. B, Affidavit of Donna R. Smith, Ph.D., ¶5.

Positive test results are used only for the assessment and treatment and not for the purpose of reducing benefits, removing the child from the home, or criminal prosecution. PEM, Item 280, at 4. A positive test result may only be disclosed to the MRO, and, to monitor compliance with assessment and treatment, the pilot site drug testing coordinator and the client's caseworker. A positive test result can only be additionally divulged to an administrative law judge if the client initiates an appeal concerning his or her test result. *See* Degnan Aff., ¶3; Smith Aff., ¶8. A positive test result cannot be disclosed to FIA's Children's Protective Services ("CPS") absent a pending or subsequent referral to CPS alleging child abuse and/or neglect in the home of the FIP client. *See* Sims Dep., Plaintiffs' Exh. Y, at 96-7.

The program does not penalize a client simply for testing positive. Rather, penalties are imposed only if the client is non-compliant with the drug testing/treatment program. If at the time the

[15]The MRO is a physician who contacts all clients who test positive and gives them an opportunity to explain the positive result. If the client claims to have a valid prescription, for example, the MRO obtains the prescription number and verifies it with the pharmacy. If the prescription is valid, the test result is considered negative. If the client provides no explanation for a positive result, the MRO certifies the test as positive. *See* PEM, Item 280, at 3. Procedures in place for the an MRO telephone interview with the client who tests positive include significant safeguards to ensure that the physician is speaking only with the actual drug test subject. *See* Exh. B, Affidavit of Donna R. Smith, Ph.D., ¶9.

case is opened or within two months of eligibility, an applicant group member is non-compliant with the assessment process or any recommended treatment stage without good cause, the PEM provides for case closure. A like failure without good cause after the first two months of eligibility results in a 25% reduction of the client's FIP payment standard, a reduction which would continue -- until case closure -- for four months if the client remains non-compliant. PEM, Item 280, at 8.

"Non-compliance" with the drug testing/treatment policy means doing any of the following without good cause: failing or refusing to complete a timely drug test, failing or refusing to complete or verify completion of an assessment of treatment needs within ten days of referral, or failing or refusing to comply with substance abuse treatment, as determined by an independent treatment agency. *Id*. at 5. "Good cause" is defined as "a circumstance beyond the client's control that prevented him from taking the required action," and includes, among other things, illness or injury or unplanned events or factors. *Id*. at 5-6. "Compliance with treatment" is a common standard used to determine if an individual has met the requirements established pursuant to his or her formal or informal contract with the treatment agency. This contract typically includes the patient's responsibilities for remaining in "good standing" in the treatment program. *See* Smith Aff., ¶6. A relapse does not constitute noncompliance. *Id*. *See also* Sims Dep., Plaintiffs' Exh. Y, at 84.

PRELIMINARY INJUNCTION STANDARD

On a motion for preliminary injunction, the court must consider the following four factors: (1) whether plaintiffs have demonstrated a likelihood of success on the merits; (2) whether an injunction would harm others; (3) whether the public interest would be served by the issuance of the injunction; and (4) whether an injunction will save plaintiffs from immediate irreparable injury. *Doran v. Salem Inn*, 422 U.S. 922, 931 (1975). As shown below, none of these factors weigh in favor of an injunction here.

ARGUMENT

I. PLAINTIFFS HAVE NOT DEMONSTRATED A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS.

A. In Determining the Reasonableness of a Search Under the Fourth Amendment, the Court Must Determine Whether the State's Interest in the Search Outweighs the Recipients' Expectations of Privacy In the Particular Context.

The Fourth Amendment prohibits only *unreasonable* searches and seizures. The Supreme Court has repeatedly held in this and other contexts that whether a particular search meets the reasonableness standard "'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)); *see also Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995). A search may be reasonable in the absence of individualized suspicion "'when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.'" *Id*. (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)); *see also Skinner*, 489 U.S. at 624 (suspicionless search reasonable where privacy interests implicated are minimal and important government interest would be jeopardized by requirement of individualized suspicion). The question in all instances is one of balancing.

"'[T]he specific content and incidents" of the right to be free from unreasonable search and seizure "'must be shaped by the context in which it is asserted.'" *Wyman v. James*, 400 U.S. 309, 318 (1971) (quoting *Terry v. Ohio*, 392 U.S. 1 (1968)). Thus, in determining the weight to ascribe the

government's articulated interest, the expectation of privacy of the individual to be searched, and the level of intrusiveness of the search at issue, the court must consider the particular context in which the search is conducted. *See, e.g., Chandler v. Miller*, 520 U.S. 305, 317 (1997) (emphasizing critical role of context in determining reasonableness); *Acton*, 515 U.S. at 665 (emphasizing special role of state as schoolmaster and diminished expectation of privacy of students in upholding suspicionless drug testing of high school athletes); *Treasury Employees v. Von Raab*, 489 U.S. 656, 674, 678 (1989) (emphasizing context of Custom Agency's "unique mission" as "first line of defense" against drug smuggling in upholding suspicionless drug testing of certain customs employees); *Skinner*, 489 U.S. at 627 (emphasizing context of highly regulated industry in determining railroad employees had a diminished expectation of privacy); *Knox County Education Ass'n v. Knox County Board of Education*, 158 F.3d 361, 375 (1998) (emphasizing "singularly critical and unique role" of teachers in guarding and influencing school children in upholding suspicionless testing of certain teachers).

Plaintiffs distort these well-settled principles by suggesting that drug testing is per se unreasonable unless the articulated governmental interest is a "compelling" one, and, moreover, that the only cognizable "compelling" interest is a "genuine threat[] to safety" or the need to protect "public health and safety." This can only occur, Plaintiffs suggest, where the individuals to be tested "undertake hazardous activities," "perform a safety sensitive function, carry firearms, or engage in any other activities that pose a particularized risk to public safety." In sum, Plaintiffs appear to reject altogether the notion of contextual balancing in favor of a bright-line rule.

The Supreme Court has flatly rejected this very argument, however, noting that "[i]t is a mistake to think that the phrase 'compelling state interest' . . . describes a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation: Is there a compelling state interest here?" *Acton*, 515 U.S. at 661.[16] Rather, the question in all instances is

[16]There, the respondents urged the Court to adopt the standard articulated by the Ninth Circuit on appeal. *Acton v. Vernonia School District*, 23 F.3d 1514 (1994). In *Acton*, the Ninth Circuit rejected the school's drug testing program on the basis that "it is not the type of potential disaster that has caused the Court or us to find a governmental interest compelling enough to permit suspicionless drug testing," *id*. at 1526, noting that prior cases involved "extreme dangers and hazards," "truly serious concerns of a safety nature" and "cases fraught with danger." *Id*. at 1524-26. Applying this standard, the court concluded that potential threats that would constitute a sufficiently "immediate" threat to justify suspicionless drug testing include "an airplane or train wreck, or a gas pipeline or

whether the articulated government interest "appears important enough to justify the particular search at hand" in light of the degree of intrusion on a legitimate expectation of privacy under the particular circumstances. *Id*.

B. The Supreme Court Has Already Weighed the Competing Interests at Issue Here and Determined That Suspicionless Searches of Welfare Recipients Are Reasonable Where the Goal Is the Promotion of Self-Sufficiency and the Well-Being of Children.

The Supreme Court has already weighed the competing interests at stake here and concluded that the government interest in the self-sufficiency of welfare recipients and the well-being of their dependent children---and its concomitant interest in upholding the public trust by ensuring that public funds are spent in a manner that achieves those goals---outweighs the diminished expectations of privacy of those who voluntarily seek public assistance. *See Wyman v. James*, 400 U.S. 309 (1970). Plaintiffs conspicuously relegate *Wyman* to a footnote, stating that the Court did not reach the reasonableness issue because it held that the home visits at issue in that case did not constitute a search. While the Court did hold in *Wyman* that there had been no search, it held in the alternative (and, along with the dissent,[17] devoted most of its attention to exhaustively discussing) that "[i]f . . . we were to assume that a caseworker's home visit . . . does possess some characteristics of a search . . ., we nevertheless conclude that the visit does not fall within the Fourth Amendment's proscription . . . because it does not descend to the level of unreasonableness." *Id*. at 318.[18]

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nuclear power plant disaster." *Id*. at 1526. The Supreme Court rejected this overly rigid standard. *See* 515 U.S. at 661.

[17]Indeed, Justice Douglas' dissent in *Wyman* reads like a road map for Plaintiffs' arguments here. 400 U.S. at 326-335.

[18]*See Zweiban v. Mitchell*, 516 F.2d 594, 633 (D.C. Cir. 1975) (describing this part of *Wyman* not as "dicta" but as the Court's "alternative holding.") As Judge Posner explained in *United States v. Crawley*, 837 F.2d 291, 292-293 (7th Cir. 1988), "dictum" is not, as here, a statement addressed to the question before the court, "not [as here] refined by the fires of adversary presentation . . . not [as here] a fully measured judicial pronouncement," and, "being peripheral, may not [as here] have received the full and careful consideration of the court that uttered it." Moreover, even if *Wyman's* reasonableness analysis were dicta, "considered dicta in Supreme Court opinions will generally be deemed

Wyman concerned New York's requirement that recipients of aid under the state's AFDC program consent to home visitations by welfare workers or risk losing their benefits. Critical to the Court's determination that the visits, even if searches, were reasonable, was the particular context of the AFDC program and its statutory purpose of '"encouraging the care of dependent children . . . by enabling each State to furnish financial assistance and rehabilitation and other services . . . to needy dependent children and the parties or relatives with whom they are living to help maintain and strengthen daily life."' *Id*. at 315 (quoting 42 U.S.C. § 601 (1964 ed., Supp. V)).[19] Under the AFDC statute, the Court noted, '"[w]henever the State agency has reason to believe that any payments of aid . . . made with respect to a child are not being or may not be used in the best interests of the child, the State agency may provide for such counseling and guidance services with respect to the use of such payments. . . ."' *Id*. at 316 (quoting 42 U.S.C. § 605). In light of this specific context, the Court noted a number of factors that "compel us to conclude that the home visits conducted by the State were not unreasonable searches." *Id*. Those same factors are present in this case as well.

First, the Court noted that, as with the TANF program, the State played a special role in fulfilling the public trust assigned to it in administering the AFDC program and in assuring that public dollars were being used for the proper objects of that program. The Court explained in this regard that the AFDC program, like the TANF program, represents an important and fundamental public interest in protecting dependent children, whose "needs are paramount" to "what the mother claims as her rights." *Id*. at 318. In fulfilling the public trust represented by the AFDC program, the Court noted, the State "has appropriate and paramount interest and concern in seeing and assuring that the intended and

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binding." *Powell v. Kovac's, Inc.*, 596 F. Supp. 1520, 1524 (W.D. Mo. 1984). As Judge Guy recognized in *Lovvorn v. Chattanooga*, 846 F.2d 1539, 1553 n.7 (6th Cir. 1988), *rev'd, Penny v. Kennedy*, 915 F.2d 1065 (6th Cir. 1990), *Wyman* "has never been overruled . . . [and] those cases that have discussed [*Wyman*] in a fourth amendment context cast no doubt on its continuing validity." *See also Von Raab*, 489 U.S. at 672 n.2; *McDonell v. Hunter*, 612 F. Supp. 1122, 1131 (S.D. Iowa 1985); *McKenna v. Peekskill Housing Auth*., 497 F. Supp. 1217, 1226 (S.D. N.Y. 1980), *aff'd in part, rev'd in part*, 647 F.2d 332 (2d Cir. 1081); *Saiz v. Goodwin*, 450 F.2d 788 (10th Cir. 1971). The one court which did decline to follow *Wyman* did so because of that part of the opinion which held that no Fourth Amendment search of the home had occurred. *Blackwelder v. Safnauer*, 689 F. Supp. 106, 137 (N.D. N.Y. 1988), *aff'd*, 866 F.2d 548 (1989).

[19]Similarly here, FIP runs wholly with the dependent minor. *See* 42 U.S.C. § 608(a)(1)(A)(i). An adult FIP recipient is not the direct beneficiary, but a mere conduit of the aid. If, for example, the recipient should lose custody of the minor, the cash assistance terminates throughout the period of separation. *See* Sims Aff., ¶12.

proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses." *Id*. at 319.

Second, the Court noted that the home visits furthered the AFDC's goals of self-support and relief of distress by providing the "personal, rehabilitative orientation" necessitated by amendments to the Social Security Act implementing a "more pronounced service orientation." *Id*. at 320. That objective, the Court explained, "requires cooperation from the state agency upon specified standards and in specified ways" to avoid "any possible exploitation of the child." *Id*. The same can be said here, as the State is responding, as it must, to the new work-oriented focus of the TANF program. Indeed, the public interest is even greater under TANF in light of the penalties imposed on states for failing to meet the federal work requirements and the strict time limitations on the receipt of federal assistance.

Third, the Court concluded that the home visits sufficiently protected privacy concerns in that written notice was provided in advance of the visit, the applicant was the primary source of information, and forcible entry was forbidden. *Id*. at 320-21. The Court also emphasized in this regard that the home visits were not used for the purpose of obtaining information as to criminal activity. *Id*. at 321; *see also id*. at 323 (the home visit "is not a criminal investigation" and "is not in aid of any criminal proceeding"); *id*. at 322-23 (visit is by a caseworker whose "primary objective is . . . the welfare, not the prosecution, of the aid recipient for whom the worker has profound responsibility"); *id*. ("the caseworker is not a sleuth but rather, we trust, is a friend to one in need"). Similarly here, the test results are not used for criminal prosecution purposes, but for identification, assessment and treatment. Moreover, courts have consistently held that the urine collection and testing procedures adopted by Michigan are minimally intrusive of privacy. *See* Part I.C.2., *infra*, at pages 19 - 20.

Finally, the Court stressed that the voluntary nature of applying for AFDC assistance resulted in a diminished expectation of privacy. As the Court explained, the recipient "has the 'right' to refuse the home visit, but a consequence in the form of cessation of aid . . . flows from that refusal. *The choice is entirely hers, and nothing of constitutional magnitude is involved*." *Id*. at 324 (emphasis added). "Important and serious as [the termination of benefits] is," the Court concluded, "the situation is no different than if she had exercised a similar negative choice initially and refrained from applying for

AFDC benefits." *Id*. at 325. Similarly here, those who apply for FIP assistance do so voluntarily. As such, they should be subject to rules and regulations designed to ensure that program goals are met. In making its determination of reasonableness in *Wyman*, the Court expressly rejected the plaintiff's implicit argument that she be allowed to receive benefits "from the agency that provides her and her infant son with the necessities for life . . . upon her own informational terms" while at the same time "utiliz[ing] the Fourth Amendment as a wedge for imposing those terms." *Id*. at 322. Rather, the Court made clear in its ruling that the voluntary acceptance of public monies expressly meant for the rehabilitation of the caretaker and the protection of the dependent child results in a concomitant sacrifice of privacy as to matters that directly pertain to the ability to achieve those rehabilitative and protective goals. If one does not wish to reveal the information necessary to assure that public funds are being directed in a manner consistent with the statutory goals, one may simply elect to forego public assistance.

Wyman is directly controlling here. The evidence summarized herein clearly demonstrates that drug use by FIP recipients threatens to undermine the very goals of TANF by hampering permanent employment objectives and jeopardizing the well-being of dependent children. As the keeper of the public trust represented by the FIP program, the State has a paramount and appropriate interest in assuring that all impediments to the ability to meet program goals are minimized, for the sake of the clients (especially dependent children), other state citizens in need of aid whose needs might be jeopardized by a decrease in federal funding, and the State itself. As *Wyman* makes clear, those who voluntarily seek such assistance cannot argue that they have a constitutional right to protect information directly relevant to the state's ability to meet program goals.[20]

[20]*Wyman* also undermines Plaintiffs' "slippery slope" argument that allowing drug testing of FIP clients would somehow support drug testing of *all* Michigan citizens. *See* Pl. Br. at 22. That special needs exist to justify testing of FIP recipients no more authorizes testing of all Michigan parents than *Wyman* authorizes home visits to observe the goings-on of all Michigan parents or guardians.

C. The State's Interests Are Important Enough to Justify Drug Testing of FIP Recipients in Light of the Minimal Intrusion Such Testing Imposes on Recipients' Diminished Expectations of Privacy.

Citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340-341 (1985), where it sustained the constitutionality of a school administrator's search of a high school student's purse, the Supreme Court noted in *Acton* that it had *already* implicitly found that the requisite "special needs" existed in the public-school arena. Likewise, as indicated above, the Supreme Court in *Wyman* has *already* found that the State has such special needs in the context of the administration of public assistance. Indeed, this case is arguably an easier one than *Wyman*, as the courts traditionally have been extremely protective of the sanctity of the home and thus have imposed a higher benchmark on searches of the home than on drug testing. *See Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 534 (1967).

If, however, the court concludes that *Wyman*, simply because it concerns home visits, is not directly controlling here, the State's drug-testing program otherwise meets the standards articulated by the Supreme Court and the Sixth Circuit in drug-testing cases. As discussed above, those cases have found suspicionless drug testing to be reasonable whenever the articulated government interest "appears important enough to justify the particular search at hand" in light of the degree of intrusion on a legitimate expectation of privacy in the particular circumstances. *Acton*, 515 U.S. at 661. As shown below, privacy expectations in the welfare context are minimized because of the special relationship between the State as administrator of the FIP program and voluntary recipients of FIP assistance. Moreover, the procedures used to conduct the testing have consistently been held to be minimally intrusive of privacy. Especially in light of the strong evidence that drug abuse impairs one's ability to maintain permanent employment and protect the well-being of dependent children, and the evidence that a substantial percentage of welfare recipients use drugs (even higher among the hard to place), the State's paramount interest under the TANF statute in achieving permanent self-sufficiency of adult clients and protecting the well-being of minor clients clearly outweighs these privacy interests.

1. The Expectation of Privacy Among Welfare Recipients Is Diminished in Light of Their Special Relationship with the State.

The first factor to be considered in determining the reasonableness of suspicionless drug testing is the nature of the privacy interest upon which the testing intrudes. The legitimacy of certain privacy expectations vis-à-vis the State depends upon the legal relationship with the State of the individual to be tested. *Acton*, 515 U.S. at 653, 657. *Wyman* makes clear that the State plays a special and unique *parens patriae* role with respect to FIP clients, to whom they provide assistance for the express purpose of getting adults back on their feet within a certain limited amount of time while ensuring that their family's needs are met in the interim. *See Wyman*, 400 U.S. at 315-18; *see also Univ. of Colorado Through Regents of Univ. of Colorado v. Derdeyn*, 863 P.2d 929, 950 (1993), *cert. denied*, 511 U.S. 1070 (1994) (in striking down drug testing of school athletes in pre-*Acton* case, court distinguished *Wyman* on the basis that the "government interests at stake" there "were the compelling parens patriae" interest "in protecting the well-being of young dependent children" and the "substantial government interest in making sure that tax dollars are appropriately spent").

Like the school athletes who chose to "go out for the team" in *Acton*, or the adults who chose to participate in a "closely regulated industry" in *Skinner*, by seeking this publicly provided assistance, FIP clients subject themselves to a necessary degree of regulation and inquiry much higher than that imposed on the general population.[21] As such, they have reason to expect intrusions upon normal rights and privileges. *See Acton*, 515 U.S. at 657; *see also Knox*, 158 F.3d at 384 (1998) (noting that when people enter the education profession, "they do so with the understanding that the profession is heavily regulated as to the conduct expected of people in that field").

[21]Thus, for example, apart from having to experience monthly to quarterly home visits -- with or without notice -- where their caseworkers observe and discuss barriers the family may have, FIP clients are also subject to having their bank and employment records examined, are required to provide intimate information regarding parentage of their children, and, if necessary, to submit to DNA testing to establish paternity. *See* Sims Dep., Plaintiffs' Exh. Y, at 23; *see also* Sims Aff., ¶10. In addition, Michigan, joining a long list of other jurisdictions, has implemented a requirement effective March 2001 that FIP applicants provide an automated finger image to prevent fraud. MCL 400.57a; MSA 16.457a. *See also* 18 NYCRR 351.2(a). It is thus absurd to argue, as do Plaintiffs, that this concentrated degree of inquiry is consistent with what is encountered "by almost every member of the public" when dealing with "government agencies." Pl. Br. at 13-14.

Moreover, there is even a further diminished expectation of privacy in the context of a welfare-to-work program because it is highly likely that many of the recipients will face mandatory drug testing when they seek employment necessary to meet the FIP program's Work First requirements. *See* Exh. D, Affidavit of Ronald G. Matthews, at ¶6; *see also* Sims Aff., ¶11. As the D.C. Circuit noted in *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir. 1991) *cert. denied*, 502 U.S. 1020 (1991), "[w]hat is occurring generally outside government is some indication of what expectations of privacy 'society is prepared to accept as reasonable."[22] *Id.* at 1192 (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) and *California v. Greenwood*, 486 U.S. 35, 39-41 nn.3-4 (1988)). Moreover, the fact that an ever-growing number of employers test for drug use as part of the hiring process, even further justifies the State's need to know as soon as possible whether drug use is an impediment which might prevent an individual from securing and/or maintaining employment.[23] Through such information, the State can better serve the client family by addressing this barrier through treatment.

[22]There, the court was impressed that the privacy expectations of a candidate for employment with the Department of Justice was diminished by an "extraordinarily intrusive" background check which included a fingerprint requirement. *Willner*, 928 F.2d at 1190-1191. Citing the voluntariness emphasized in *Wyman*, *Willner* noted that no one is compelled to seek a Justice department position. *Id*. at 1190.

[23]*See* Office of Applied Studies, "Workplace Drug Testing Program" (Exh. 38) (according to American Management Association's annual Survey on Workplace Drug Testing and Drug Abuse Policies, workplace drug testing has increased by more than 1,200 percent since 1987 and more than 81 percent of businesses surveyed in 1996 were conducting some form of applicant or employee drug testing); *See also* Bush & Kraft, Exh 9 at 3 (indicating concern that a failure to detect a substance abuse problem before a potential employer does may stigmatize welfare applicants and thereby jeopardize the prospects of other recipients).

2. Michigan's Drug Testing Procedures Are Designed To Be Only Minimally Intrusive of Privacy.

The next consideration in balancing the reasonableness of a suspicionless drug-testing program is the character of the intrusion that is being challenged. *See Acton*, 515 U.S. at 658. In urine testing cases, "the degree of intrusion depends on the manner in which production of the urine sample is monitored." *Id*. Where, as here, the conditions of specimen collection are "nearly identical" to those typically encountered in public restrooms," "the privacy interests compromised by the process of obtaining the urine sample are . . . negligible." *Id*.; *see also Chandler*, 520 U.S. at 318; *Skinner*, 489 U.S. at 626.[24] The other "privacy-invasive aspect" of a urinalysis is the amount of information that it discloses. *Acton*, 515 U.S. at 658. Again, where, as here, the analysis is limited to the presence of certain drugs and the results are limited to a class of personnel who have a need to know the results, the tests are not considered overly intrusive. *Id*.[25]

In fact, the State's drug-testing procedures are nearly identical to procedures found by the Sixth Circuit to be "fairly circumscribed and unintrusive" in *Knox*. There, as here, the process of sample collection was not observed directly, the lab screened the specimen only for certain drugs, positive specimens were re-tested and verified, an MRO contacted those with positive results to make sure there was no alternative explanation, and the information was distributed only to those with a need to

[24]In *Skinner*, drug testing was approved even though railroad workers were required to provide urine samples under direct supervision of a physician or technician, 489 U.S. at 646 (Marshall, J., dissenting). In *Von Raab*, drug testing was approved despite the presence of a "monitor of the same sex . . . [who] remains close at hand to listen for the normal sounds of urination." 489 U.S. at 661. Unlike these conditions, the collection process here is "dignified and discreet." *Willner*, 928 F.2d at 1189.

[25]Consistent with Federal drug testing regulations, a positive test---whether resulting from either a suspicionless test or, Plaintiffs' recommended approach, a "less intrusive" screening instrument---may only be disclosed to the FIP client, the MRO, the pilot site drug testing coordinator, the client's caseworker and an administrative law judge presiding over any procedure initiated by the individual concerning his or her test result. *See* Smith Aff., ¶8; Deposition of Patricia Degnan, Plaintiffs' Exh. Z, at 56; Degnan Aff., ¶3. Contrary to Plaintiffs' suggestion, local health departments are not privy to a positive test. Instead, whenever it closes an open, active FIP case due to any sanction, FIA 's Child-Well-Being liaison refers the case to the Department of Community Health which, after the case has been closed at least 30 days, visits the family to discern if any dependent children are in jeopardy due to a lack of financial resources following the closure. *See* PEM, Item 280, Plaintiffs' Exh. U, at 9; Sims Aff., ¶13. As it is the closure -- not a recipient's positive test or failure to comply with assessment or treatment -- which is the triggering event, the visit is not for the purpose of determining if there is drug use.

know. *Knox*, 158 F.3d at 380. Moreover, despite Plaintiffs' argument that Michigan's drug testing is overly intrusive because it is not random, the *Knox* court specifically held that the testing in that case was *less* intrusive precisely because it was not random. *Id*.; *see also Von Raab*, 480 U.S. at 676 n.4.[26]

3. The Nature of the Governmental Interest at Issue Here Is Sufficiently Important.

The final factor to be considered is the nature of the government interest that the drug-testing program seeks to further and whether that interest would be jeopardized by a requirement of individualized suspicion. Again, context is critical in determining the importance of the asserted governmental interest. *See*, *e.g*., *Von Raab*, 480 U.S. at 672 (emphasizing special role of Customs Agency in drug interdiction efforts in determining importance of suspicionless testing of agents involved in those efforts); *Knox*, 158 F.3d at 374 (noting "unique context" of school setting in determining importance of state interest in testing teachers).

Here, the government interest is the self-sufficiency of adult FIP clients and the well-being of their minor children, in light of the work requirements and lifetime limits instituted by the TANF program. Under that program, the states have the onus of ensuring that welfare assistance is only a temporary experience, not a way of life, and of ensuring that dependent children will be provided for in the interim. As the Supreme Court made clear in *Wyman*, in its role as administrator of this program, the state has a paramount interest in acquiring information relevant to ensuring that those goals are not jeopardized by the actions of adult clients or members of their households and in ensuring that public funds allocated to meet program goals are not being misspent. *Wyman*, 400 U.S. at 315-18; *see also Derdeyn*, 983 P.2d at 950 (describing government interests in *Wyman* as "the *compelling* parens patriae governmental interest in protecting the well-being of young, dependent children, and the *substantial* interest in protecting the well-being of young, dependent children, and the *substantial*

[26]Because welfare clients are not in an environment where they can be called into the office on a moment's notice, it would be impossible to conduct completely random drug tests. By upholding both random and non-random drug testing programs, the Supreme Court has not, as Plaintiffs suggest, held that lack of randomness is fatal to the reasonableness of a drug-testing program.

government interest in making sure that tax dollars are appropriately spent and not wasted through welfare fraud or otherwise") (emphasis added).

Despite Plaintiffs' rather remarkable assertion that substance abuse is not a barrier to employment,[27] experts in the fields agree that, while substance abuse is not the only barrier to employment, it is a significant one that must be addressed if the welfare-to-work program is to succeed. *See* sources cited at pages 3 - 6. Because FIP clients are not subject to day-to-day scrutiny, testing based on individualized suspicion is not practical. *See, e.g.*, *Von Raab*, 480 U.S. at 674.

The unique relationship between the State as administrator of FIP and its clients alone is enough to justify suspicionless testing here, even if there were no evidence of drug use and abuse among welfare recipients. *See id*. at 674, 678 (holding that while there was not a demonstrated drug use problem among customs agents, suspicionless testing was reasonable given the agency's "unique mission" as "the first line of defense" against drug smuggling and the fact that any drug use among agents might undermine that mission); *Knox*, 158 F.3d at 374-75 (holding that fact that there was no evidence of a drug problem among school teachers was not fatal to testing program given the "unique" role of the state as guardian and educator of children in their formative years). Here, however, the importance of the State's interest is bolstered even further by the magnitude of evidence demonstrating that a *substantial* percentage of welfare recipients use drugs, and that this percentage is likely to grow as non-impaired clients enter the workforce.[28] *See* sources cited in Table A. Indeed, these studies show

[27]Plaintiffs base this assertion solely on the fact that substance abuse is not mentioned as a major barrier to employment in a 1997 survey of Michigan welfare recipients and agency personnel. In light of the overwhelming agreement by experts in the field that substance abuse impairs one's ability to find and maintain employment, *see, e.g.*, n.4, *supra*, the mere fact that this report does not mention substance abuse does not undermine the State's argument. If anything, the failure to mention substance abuse in the report reveals the deficiencies inherent in self-reporting of substance abuse problems and reliance on case worker's ability to spot such problems. In a more recent report, 21 of 40 state TANF administrators reported that 20% or more of their TANF participants needed to address substance abuse problems. On average, substance abuse ranked third in this report, behind only low skill levels and transportation problems, and ahead of child care availability, poor participant motivation or attitude and domestic violence. *See* Diana D. Woolis et al., "Recovery: An Act of Work," *Policy & Practice* at 35 (June 2000) (Exh 39).

[28]Plaintiffs blithely assert that there is no documented problem of drug use among Michigan welfare recipients, pointing to the results of drug testing conducted to date. It can hardly be said, however, that results from the mere five weeks the program was allowed to operate constitute a representative sample. More importantly, the cases do not require that the State produce *any* evidence of a particular problem, much less evidence of a particular problem

that the prevalence of drug use among welfare recipients is higher than that among the general population.[29] *See id*. As the Sixth Circuit explained in *Knox*, "the existence of a pronounced drug problem is not the sine qua non for a constitutional suspicionless drug testing program," but where, as here, such evidence exists, it bolsters the importance and immediacy of the interest asserted and "tips the equities in favor of upholding suspicionless drug resting." 158 F.3d at 374.

In the end, Plaintiffs' primary complaint seems to be with the method in which the State is attempting to identify those clients with substance abuse problems. According to Plaintiffs, FIA's reliance on urinalysis is unreasonable under the Fourth Amendment because it is not the "least intrusive" means of discovering the information. In *Acton*, however, the Supreme Court stressed that "[w]e have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." 515 U.S. at 663 (citing *Skinner*, 489 U.S. at 629 n.9 (collecting cases)).

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within four pilot sites. *See, e.g*., *Skinner*, 489 U.S. at 608 (upholding suspicionless drug testing based in part on national evidence of a problem, without proof that a problem existed on the particular railroads whose employees were subject to the test); *Von Raab*, 489 U.S. at 673 (upholding suspicionless testing where there was no documented history of drug use by any customs officials). Notwithstanding, 10.3% of FIP applicants tested positive during the limited trial period, and 22.9% of select, ongoing FIP recipients with difficult histories of obtaining or maintaining employment have tested positive for drugs from November 1, 1998 through May 31, 2000. *See* Sims Aff., ¶4; Matthews Aff., ¶10. In contrast, only 1.1% of all prospective state classified employees other than with the Department of Corrections (1.3% among FIA candidates), hired with an effective date of August 1, 1998 through May 31, 2000, tested positive for the same drugs for which FIP applicants were tested. *See* Exh E, Affidavit of Kenneth R. Swisher, at ¶6; Exh F, Affidavit of Michael J. Masternak, at ¶6. Moreover, contrary to Plaintiffs' suggestion, there is no magic percentage of drug users in a particular category that will be considered sufficient. As noted above, in some cases there is no evidence of drug use. Other cases have upheld suspicionless drug testing based on very low percentages of estimated drug users. *See Von Raab*, 489 U.S. at 668, 673 (emphasizing the deterrence value, the Court was untroubled by the "mere circumstance" that only five employees out of 3,600 (.014%) had tested positive). Finally, to the extent that the court is inclined to find the results of the trial testing insufficient to suggest a problem, the State notes that, consistent with Plaintiffs' arguments, the positive results must be deemed uncharacteristically low since "marijuana is the only drug [screened] whose use is relatively more difficult to hide through timing of the drug test," Pl. Br. at 13, and the results would likely have been even higher if the testing had continued because prospective applicants would not have been as successful at indefinitely deferring the date of their applications until the issuance of injunctive relief. Pl. Br. at 25.

[29]Ignoring the vast statistics, Plaintiffs point to the testimony of Ms. Sims that in her personal opinion welfare recipients did not use drugs to a higher degree than non-recipients. First of all, Ms. Sims' observations are not based on comprehensive studies as are the sources cited in Table A. If anything, her testimony reveals the imprecision of reliance on personal observation for evidence of drug use. More importantly, even the cases which have relied in part on statistical evidence have never suggested that drug use among the target group must be *greater* than in the larger society. At any *level*, drug use undermines the State's goals by impairing clients' ability to be self-sufficient and endangering their dependent children.

This position makes sense as a policy matter. As long as the governmental interest at stake is important enough to outweigh the expectation of privacy in the particular context, the courts should not interfere with the legislative decision as to how to go about addressing the problem.

The *Acton* court also noted as an aside that reliance on teachers to observe the students and report any suspected drug use had its own difficulties in that "it adds to the ever-expanding duties of school teachers the new function of spotting and bringing to account drug abuse, a task for which they are ill-prepared." *Id*. at 664. Adding that a drug impaired individual, even in, unlike here, a closely-supervised employment context, "will seldom display any 'signs detectable by the lay person or, in many cases, even the physician,'" *id*. at 628, the Court opined that, "in many respects . . . testing based on 'suspicion' of drug use would not be better, but worse." *Id.* at 624 (emphasis added); *see also* Sims Dep., Plaintiffs' Exh. Y, at 72-3.[30]

Similarly here, the screening devices suggested by Plaintiffs are fraught with their own limitations. As Plaintiffs point out, there are many other barriers to employment that must be dealt with in order for the states to fulfill their expectations under TANF. Accordingly, agency employees have their hands full with problems other than substance abuse. Moreover, spotting abuse problems and interpreting screening survey results is largely subjective and requires training, time, and commitment by agency workers who are already overwhelmed with other matters and whose job description and expectation does not and should not include drug detective or investigator. In fact, these very problems -- coupled with the phenomenon of clients conferring amongst themselves on means to answer questions to circumvent detection -- have been cited as reasons why the screening mechanisms urged by Plaintiffs as enjoying "marked success," Pl. Br. at 16, are not proving effective in practice.[31]

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[30]Suspicion-based testing which might result from, for example, screening instruments, also raises the specter of arbitrariness, as "disfavored" clients could find themselves unfairly singled out for drug testing. Conversely, "favored" clients could be excused from drug testing. "The cases upholding warrantless administrative searches clearly establish that these rules require certainty, regularity, and neutrality in the conduct of the searches." *Turner v. Dammon*, 848 F.2d 440, 446-447 (4th Cir. 1988) (emphasis added). To avoid arbitrariness, the answer is not, as Plaintiffs seemingly suggest, to arm caseworkers with unlimited discretion.

[31]*See, e.g.*, Greg Garland, "Drug Abuse Program Reaches Few," *Baltimore Sun* (Nov. 29, 1999) (Exh. 40) (reporting that Maryland's system for screening people for substance abuse is not working); S. Gardner & N. Young, *The 1%*

4. The State's Interest Here Goes Far Beyond the Interest Articulated in *Chandler*.

Plaintiffs' attempt to argue that the State's drug testing program is no more reasonable than the testing found to be merely "symbolic" in *Chandler* is wholly misplaced. This case is fundamentally different from *Chandler* in many respects, all of which weigh in favor of finding the State's program to be reasonable.

First, unlike here, the State in that case was unable to point to any precedent suggesting that a State's power to establish qualifications for state offices diminishes the constraints on state action imposed by the Fourth Amendment. *Id.* at 317. Here, on the other hand, *Wyman* clearly establishes that the State has such special needs in the context of the administration of public assistance.

Second, in contrast with the evidence proffered here that a substantial percentage of welfare recipients uses drugs and, even, that the percentages of drug use and impairment are higher among FIP recipients than non-recipients, there was no evidence in *Chandler* that drug-impaired individuals were likely to be candidates for public office in Georgia. *Id.* at 319. Even accepting Plaintiffs' unsupported assertion that the rate of use or abuse among the FIP community is "a largely imaginary problem," at least comparable to the general population, Pl. Br. at 9-10, 17, 21 n.9, Plaintiffs themselves have acknowledged a greater problem than that which was presented in *Chandler*.

Third, Georgia offered no reason in that case why ordinary law enforcement could not apprehend addicted individuals "should they appear in the limelight of the public stage." *Id.* at 320 (emphasis added). The *Chandler* Court emphasized that, even beyond the norm in the typical

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Problem: The Case of Missing Clients (Children & Family Futures, 1999) (Exh. 41) (noting that despite evidence that 15-20% of the welfare population has a substance abuse problem, experience has shown that very few clients have self-disclosed or been referred for substance abuse; explanations for this include that agency workers are adopting a "don't ask, don't tell" approach, are afraid to ask the necessary questions, do not want to take the extra time that it takes to do a thorough assessment, and lack proper training); Nina Bernstein, "City to Search Medical Files in Effort to Force Welfare Applicants Into Drug Treatment," *New York Times* (Sept. 25, 1999) (Exh. 42) (reporting that New York City's system of drug screening is finding unrealistically low rates of substance abuse among welfare clients, in part because "mothers are known to coach each other in the waiting room on how to answer the questionnaire to avoid being assigned to mandatory treatment."). *See also* Sims Dep., Plaintiffs' Exh. Y, at 74; Degnan Dep., Plaintiffs' Exh. Z, at 60-1; Sims Aff., ¶6 (screening questions posed may not represent a serious attempt to identify substance abuse).

workplace, the daily conduct of candidates for public office was subject to "relentless scrutiny--by their peers, the public, and the press." *Id.* at 321. In stark contrast, FIP recipients are not exposed to the constant scrutiny visited upon candidates for public office, let alone those in traditional office environments.

Fourth, *Chandler* emphasized that, because a candidate had 30 days to schedule a drug test, Georgia's law was not well designed to identify candidates who violate antidrug laws. Plaintiffs maintain that, likewise, Michigan's drug testing program casts an "entirely avoidable net," claiming FIP applicants can themselves determine the time for their applications and FIP recipients' annual redetermination interviews "occur in predictable intervals." Pl. Br. at 25-26. This argument, however, belies Plaintiffs' own assertions that applicants seeking FIP assistance do not enjoy the ability to simply wait for a "favorable" application date because, as noted by their counsel, they are in "desperate straits [and in] need [of] emergency assistance," Sims Dep., Plaintiffs' Exh. Y, at 28, 80, 107, 109, leaving them no alternative but to turn to the State, and runs counter to the reality of the revolving door Plaintiffs have described where, similar to Plaintiff Konieczny's circumstances, "it is common for recipients of FIP benefits to lose their benefits when they find temporary employment and then reapply for benefits when the temporary employment ends." Plaintiffs' November 23, 1999 brief in opposition to Defendant's Rule 12(b) Motion to Dismiss at 9 n.4.[32] While a casual drug user might, as Plaintiffs allege, be able to evade detection by the timing of his or her FIP application, a more chronic user, one who uses drugs one or more times a week, *see* Smith Aff., ¶4, and whom the testing is designed to identify and treat, is not likely to be as successful, particularly if he or she is desperate.

Fifth, unlike Michigan, which seeks first to identify and then treat substance abuse barriers, Georgia's program failed to offer any treatment for an impaired candidate. Those individuals and families receiving treatment here for previously unacknowledged substance and alcohol abuse problems

[32]Confirming this phenomenon, 24 of 36 FIP applicants in Alpena County, a pilot site, had previous FIP caseloads, 12 within the seven months preceding the date testing began. *See* Sims Aff., ¶5. In the Greenfield/Joy district of Wayne County, 15 of the 18 FIP applicants testing positive were also prior recipients, six having cases closing between June and September, 1999. *Id*.

would not agree with Plaintiffs' assertion that Michigan's testing program was merely "symbolic."[33]

Finally, Plaintiffs' reliance on the reference to public safety in *Chandler* is similarly misplaced. There, having failed to articulate any objective other than to send a signal to voters, Georgia attempted to justify its drug testing requirement by arguing that an impaired candidate posed a threat to public safety. It is in this context that the *Chandler* Court, not articulating new law, merely "reiterated" that, where public safety is articulated as the justification for suspicionless testing, the risk to public safety must be "substantial and real" to support blanket searches. *See Chandler*, 520 U.S. at 323.

That *Chandler* did not intend to suggest that a legitimate threat to public safety was essential to proving reasonableness is readily apparent by the fact that it cited *Acton* with approval. In *Acton*, the Court repudiated such a requirement when it rejected a Fourth Amendment challenge to suspicionless testing of high school students. As the Court explained, "[d]eterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs, . . . or deterring drug use by engineers and trainmen." 515 U.S. at 661-2.

Moreover, even accepting Plaintiffs' "public safety" argument on its face, it cannot be ignored that, unlike in *Chandler*, there is an important public safety component here, in light of the overwhelming evidence that substance abuse and child neglect and abuse are highly correlated. *See* page 4, *supra*. As noted, the primary beneficiaries of FIP are minors. The very goal of the FIP program is to ensure self-sufficiency of the parent so that the minor can be supported. Given the State's *parens patriae* interest in minor FIP recipients, the State has a strong interest in identifying substance abusers not only for the negative impact such behavior may have on fulfilling employment goals but also because of the potential danger posed to the children of abusers, whose interests are paramount.

[33]*See* n.14, *supra*; s*ee also* Wendy Wendland, "Welfare clients put to the test over drug use," *Detroit Free Press* (Sept. 10, 1999) (Exh. 43) (reporting that a 37-year old mother of 12 and 17-year old sons who had been clean for a month after smoking marijuana for 20 years and who said that until she failed the drug test she was never forced to confront her drug use. "'There is a whole lot of women in this town who are taking the (welfare money) and turning it over to the drug dealer to get them their fix,' she said. 'This is really a good thing. If they would have had this years ago, things probably would be better for me.'") (emphasis added).

II. A PRELIMINARY INJUNCTION WOULD SUBSTANTIALLY HARM THE STATE'S ABILITY TO MEET TANF GOALS WITHIN THE PRESCRIBED TIME PERIOD AND WOULD NOT SERVE THE PUBLIC INTEREST.

The potential harm to the State that would result from an injunction also disfavors injunctive relief. The State has a clear interest in protecting the public interest by maximizing federal assistance for those in need and ensuring that TANF goals are met. This interest is entitled to considerable weight in the preliminary injunction analysis. *See, e.g., Gaudiness v. Lane*, 733 F.3d 1250, 1262 (7th Cir. 1984). Injunctive relief would seriously hamper the State's ability to fulfill TANF's work participation goals in the short time period allotted under federal law. The clock continues to tick for those recipients who are underemployed. Statistics suggest that at least some of those people may remain on the FIP caseload because of a substance abuse problem.

For these same reasons, the public interest would not be furthered by an injunction here. As the Sixth Circuit noted in *Hamlin Testing Labs, Inc. v. U.S. Atomic Energy Comm'n*, 337 F.2d 221, 222 (6th Cir. 1964), this factor is "crucial" "[i]n litigation involving the administration of regulatory statutes designed to promote the public interest." In such instances, "[t]he interest of the private litigant must give way to the realization of public purposes." *Id*. In *Wyman*, the Supreme Court expressly recognized the public interest inherent in ensuring that the objectives of the welfare program are met. As demonstrated above, those objectives would necessarily be compromised by delaying the pilot program even further.

As Michigan's drug testing program is authorized by section 902 of PRWORA, additionally militating against the issuance of preliminary relief is the presumption of constitutionality which attaches to every Act of Congress, a factor not merely to be considered in evaluating success on the merits, "but an equity to be considered in favor of applicants in balancing hardships." *Walters v. Nat'l Association of Radiation Survivors*, 468 U.S. 1323, 1324 (1984). "'Given the presumption of constitutionality granted to all Acts of Congress,' it is . . . appropriate that the statute remain in effect pending . . . review." *Bowen v. Kendrick*, 483 U.S. 1304 (1987) (citing *Schweiker v. McClure*, 452 U.S. 1301, 1303 (1981)).

III. PLAINTIFFS HAVE FAILED TO DEMONSTRATE IRREPARABLE INJURY.

Plaintiffs argued in their original briefing that they would be subject to irreparable injury because they will be put in the position of either submitting to a urinalysis or foregoing FIP benefits while the case is pending. As the Court noted in the pre-TANF *Wyman*, there is no "constitutionally significant" right to welfare benefits. Moreover, the Supreme Court and Sixth Circuit precedents make clear that, given the specific testing procedures adopted by the State, the supposed "imminent harm" resulting from providing a urine sample is not greater than what would be expected of someone submitting to a yearly physical exam. Certainly, the claimed "stigma" that plaintiffs claim they will feel is not the type of "peculiar" harm that justifies injunctive relief. *See, e.g.*, *American Hospital Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980).

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that Plaintiffs' motion for preliminary injunction be denied.

Respectfully submitted,
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